STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Donald S. Owens, Richard Allen Griffin, and Bill Schuette

PEOPLE OF THE STATE OF MICHIGAN,

Docket No. 124811

Plaintiff-Appellee,

-vs-

WAYNE L. YOUNG,

Defendant-Appellant.
_____/

BRIEF ON APPEAL – DEFENDANT-APPELLANT
(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

VRN*Supreme Court Brief*20804 August 13, 2004
Wayne L. Young

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court on January 23, 2002. A Judgment of Sentence was entered on February 12, 2002. The Court of Appeals affirmed Defendant-Appellant's convictions in an unpublished opinion on September 25, 2003. This Court granted Defendant-Appellant's application for leave to appeal in an order dated June 3, 2004.

STATEMENT OF QUESTIONS PRESENTED

I. ARE MICHAEL MARTIN OR EUGENE LAWRENCE POTENTIAL ACCOMPLICES IN THE SHOOTING DEATHS OF PAULINE BURKS AND MARQUIS CONLEY?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. IS THE ISSUE OF CREDIBILITY "CLOSELY DRAWN," WHERE MARTIN AND LAWRENCE WERE THE KEY PROSECUTION WITNESSES, THEREFORE REQUIRING REVERSAL BECAUSE THE COURT FAILED TO INSTRUCT THE JURY REGARDING ACCOMPLICE TESTIMONY?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. IS THE 'CLOSELY DRAWN' RULE ANNOUNCED BY PEOPLE V MCCOY, 392 MICH 231, 240 (1974) INCONSISTENT WITH MCL 768.29 AND MCR 2.516(C)?

Court of Appeals made no answer.

Defendant-Appellant answers, "No".

STATEMENT OF FACTS

Introduction

On January 23, 2002 a Wayne County jury acquitted Defendant-Appellant Wayne Young of four counts of first-degree murder[1], finding him guilty of the lesser offense of second-degree murder on each count.[2] The jury found him guilty as charged of assault with intent to rob while armed[3], felon in possession of a firearm[4] and felony firearm[5]. (110a).

The charges in this case arose from the shooting of two people, Pauline Burks and Marquis Conley, at a drug house in Detroit. There were no eyewitnesses to the shooting. There was no dispute about the cause or manner of death, which was homicide as a result of each person being shot once in the head. The only dispute at trial was over the identity of the shooter. Mr. Young, while opting not to testify and presenting no defense witnesses, made the credibility of the prosecution witnesses a principle issue at trial.

Mr. Young was bound over for trial based on the testimony of two witnesses, Michael Martin and Eugene Lawrence. (See, generally, preliminary examination transcript).

Events Prior to the Shooting

On June 24, 2001, Marquis Dixon was standing outside his aunt's house. Dixon knew Mr. Young and testified that Mr. Young asked him if he had "a heater" or knew where to get

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[1] Mr. Young was charged, on alternative theories, with first-degree premeditated murder (MCL 750.316(1)(a)) and first-degree felony murder (MCL 750.316(1)(b)) for the shooting deaths of the two complainants.
[2] He was sentenced on two counts of second-degree murder (MCL 750.317) to 45 to 75 years imprisonment. (111-118a)
[3] MCL 750.89
[4] MCL 750.224f
[5] MCL 750.227b

one. (Heater refers to a gun). This was the first time Mr. Young had asked him such a question. Mr. Dixon told Mr. Young that he did not have a gun.

Michael Martin lived in the same house as Dixon's aunt. He had known Mr. Young for about three years based on family connections. (3a). Martin had some prior disputes with Mr. Young. (2a). According to Martin, on June 24, 2001, Mr. Young came into his room and asked him for a gun. Martin was lying in bed at the time. Young allegedly said that he wanted the gun to "hit a lick," or in other words, to rob somebody. Martin claimed that Mr. Young told him it would be an easy job because there were no guns at the place to hinder the robbery. (3-4a).

Martin did not have a gun for Mr. Young, but he called his brother-in-law Eugene Lawrence and let Mr. Young talk with him. (4-5a). After the phone conversation, Martin got out of bed and he and Mr. Young went over to Lawrence's home. (5-6a). Martin claimed he did not tell Lawrence that Mr. Young wanted the gun so he could "hit a lick." (24a).

At Lawrence's house, Martin stayed in the front room while Mr. Young and Lawrence walked to the back. (5-6a). According to Lawrence, Mr. Young told him that he wanted a gun because he was having problems with some guys. Lawrence gave Mr. Young his wife's .38 caliber gun. (6a, 34-35a). Lawrence told Martin "he going to get in trouble for whatever him and Wayne had talked about." (23a).

Mr. Young, Martin and a friend named Denise Shirley then drove back to Martin's house. Mr. Young parked the car and walked toward Grover Street, which is on the way to Seymour Street where the shooting took place. (6-7a). According to Martin, Mr. Young then called him and spoke to him about the robbery. Martin hung up because he did not want to be involved. (8a).

Martin knew a number of very specific details about the Seymour Street house and the drug operation there. He testified that he asked Mr. Young a number of questions when they were on the phone. (26a). Mr. Young was in the southwest bedroom with Pauline Burks, the future victim, when he called Martin. (17a, 20a, 25a, 27a). The 'drop off man' had taken the money, but would soon return to the house with more money and drugs. (27-28a).

Ronald Mathis, known as Hound, was in the drug business with the Burks and Conley. (51a). He was at the drug house on Seymour Street with them just prior to the shooting. (47a). Complainant Burks was in the rear bedroom with a male who had an afro and braids. (42-43a). This male offered to sell Hound his gun, but said it would not be available until later. (41-43a).

The Shooting

Mathis left the house and when he returned about fifteen minutes later he found his friends dead. He ran outside and used his cell phone to call 911. (44a). Mathis then left the area. (45a). Mathis testified that he did not wait for the police, because "I thought they might lock me up thinking I had something to do with it." (45a).

Cedric Butler was sitting on his porch near the drug house when he heard two gunshots. The shots sounded like firecrackers to him, so he did not call the police. (52-53a). Butler was out on his porch that day and saw only Hound go in and out of the house. (53-54a, 55a, 56a). When Hound left the house he came over and asked to use Butler's phone. (53-54a).

Events After the Shooting

According to Martin, he next saw Mr. Young, when Mr. Young came to his house and again shook him out of his bed. (9a). Martin testified that Mr. Young told him that he had shot someone. He testified that Mr. Young said that the lick he was hitting was "fucked up" and he had to shoot a guy and girl in the head because they had no money. (8-9a). Mr. Young also told

Martin that a third person was at the house. Martin characterized this person as the "drop off man" who transported the drugs and the money. (9-10a). Martin testified that Mr. Young did not say why he failed to rob this third person. (10a).

Martin allowed Mr. Young to change T-shirts at his house. (11-12a). They heard sirens and Martin left his house to investigate. He saw police carry somebody out of the Seymour Street house. (11a).

After Mr. Young left, Martin called his brother-in-law, Lawrence to tell him that Young had shot two people. (12a) Lawrence immediately came over to Martin's house and they both drove over to Young's house, stopping for a pizza along the way. (13a, 30a, 35-36a).

When they arrived at Mr. Young's house, Mr. Young was there with his girlfriend Vickie. According to the two men, Mr. Young volunteered to them that he had "popped a nigger." (13a, 36-37a). According to Martin Mr. Young said he was going to take a bleach bath to wash the gun residue off of him. (13a-14a).

Lawrence asked Mr. Young to return his gun. Mr. Young talked with an unknown person on the phone and then directed Martin and Lawrence to the field next to Martin's house. They went to the field and Martin picked up the gun, placed it in a bag, and put it in the trunk of Lawrence's car. (14-15a, 37-38a). Martin testified that he got the gun from the field. Lawrence testified that Martin saw somebody in the field before getting the gun. (15a, 38a).

Investigation of Martin

Within hours of the shooting, police picked up Martin at his house and took him to the homicide division for questioning. (17-18a). Martin waived his Miranda rights. (1a). Somebody had seen Martin and his car in the vicinity of the shooting. (18a). In his first statement to the police, Martin said nothing about Mr. Young asking for a gun to hit a lick,

nothing about later retrieving the gun from a field, nothing about Lawrence lending a gun to Mr. Young, and nothing about the shooting taking place around the corner from his house. (19-21a, 29a).

The following day the homicide detectives returned to Martin's house and again took him to the police station. Martin made a second statement, waiving his *Miranda* rights. (21a). In this second statement Martin added the information about Mr. Young's desire to borrow the gun to "hit a lick." (21-22a). Martin admitted that he lied to the police and that neither of his statements were accurate. (29-31a). During the second interrogation, Martin was in a room with two officers and did not feel free to leave. (32a).

Lawrence testified that he initially told Martin not to tell police about the gun because he thought he "was going to get in trouble for loaning him that gun." (38a). However, Martin told the detectives about the gun during the second interrogation, because "he knew that it had to be told." (33a). Martin turned the gun into the police. (16a).

Identification

After the incident, Ronald Mathis identified the male in the house who had offered to sell him a gun, at a line-up at the Wayne County Jail. (45-46a). At trial, Mathis initially did not identify this male, but following an out-of-court conversation with Detective Carlisle, the prosecuting attorney recalled him to the stand. (50a). Upon testifying a second time, Mathis identified Mr. Young as this male in the house. (49a). He testified that he failed to identify Mr. Young when he was previously on the stand because his hair was different and he did not know he would be sitting so close to him. (48-49a).

Evidence Collections / Analysis

Michael Choukurian, an evidence technician, collected drug paraphernalia and cigarette butts from various locations in the house. He described damage to a doorjamb and signs of a forced entry. (57a, 59a). He observed blood on the stairway, in the dining room, and in the living room.. (57-58a). Both dead bodies were in the living room. (57-58a).

Paul Hartzell, a firearms expert, could not determine if the fired bullets came from the .38 special revolver. The bullet fragments were too damaged to make an identification.

Leigh Hlavaty, the medical examiner, determined that the shooter held the gun to the head of each complainant and fired. She drew this conclusion from the presence of gunpowder in the wounds.

Cathy Carr, a forensic serologist, tested some of the items found in the home and matched Mr. Young's DNA profile to the DNA from one cigarette butt found in the southeast bedroom of the home. (60-62a). Mr. Young's DNA was excluded from the cigarette butts recovered in the living room, where the complainant's bodies were located. (57-58a, 63a). DNA reference samples were not taken and tested from Martin, Lawrence, Mathis, or any other source. (64a).

Jury Deliberations

The jury sent out several notes during deliberations. The first note asked for exhibits, Martin's testimony and Lawrence's testimony. (104a). On the second day of deliberations, the jury asked for the police evidence report on the gun. (105a). The third note from the jury stated that the jurors were unable to reach a decision. (107a). Less than two hours after sending this note and receiving a deadlock instruction, the jury returned a verdict of guilty of four counts of second degree murder. (106-110a).

Questions Raised and Procedural History

Mr. Young appealed by right on a number of issues, including the necessity for an instruction involving accomplice testimony. The Court of Appeals affirmed his convictions. (111a). People v Young, unpublished opinion per curiam of the Court of Appeals, decided September 25, 2003, 7 (Docket No. 240832). This Court granted leave on the limited question of "whether the 'closely drawn' rule announced by People v McCoy, 392 Mich 231, 240 (1975) is inconsistent with MCL 768.29 and MCR 2.516(C)." (119a).

On July 28, 2004, this Court granted Mr. Young's motion to modify the Order, and added two additional questions to the grant of leave:

(1) whether Michael Martin or Eugene Lawrence were accomplices;

(2) whether the facts of the case establish a "closely drawn" issue of credibility (120a).

Additional facts may be discussed where pertinent below.

ISSUE PRESERVATION / STANDARD OF REVIEW

Even though this Court presented three distinct questions, the overall issue involves the applicability of the holding in People v McCoy 392 Mich 231; 220 NW2d 456 (1974), to Mr. Young's case and the continued validity of the Court's holding in McCoy. The issue involves the necessity of jury instructions for accomplice testimony in Mr. Young's case.

Defense counsel neither objected at trial to the lack of an accomplice instruction nor requested the appropriate instruction. Accordingly, none of the separate issues are preserved for review.[6]

In People v Carines, 460 Mich. 750, 762-765; 597 NW2d 130 (1999), this Court set forth a general rule that in the absence of an objection or request for specific jury instructions, review of allegedly defective jury instructions is warranted only when the failure to give such instructions constituted "plain error". See also People v Grant, 445 Mich 535, 547-549, 553; 520 NW2d 123 (1994). In Carines, the Court "reaffirmed" its prior decision in Grant, which adopted the "plain error" standard from United States v Olano, 507 US 725; 113 SCt 1770 (1993). Under that rule, an error may be considered on appeal if: 1) an error occurred, 2) the error was plain, 3) and the plain error affected substantial rights. Olano, supra, 731-734. The Court in Carines, supra, 763, citing Olano, at 734, stated that this third requirement normally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.

The jury heard evidence indicating that Martin and Lawrence were accomplices. The lack of an instruction allowing the jury to properly evaluate this testimony prejudiced Mr. Young to the extent that there was plain error in his trial.

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[6] Appellate counsel raised an ineffective assistance of counsel issue premised on trial counsel's failure to request the accomplice instructions.

I. MICHAEL MARTIN, EUGENE LAWRENCE AND RONALD MATHIS WERE ALL POTENTIAL ACCOMPLICES IN THE SHOOTING DEATHS OF PAULINE BURKS AND MARQUIS CONLEY.

A jury could infer that Michael Martin and Eugene Lawrence acted as accomplices in the botched robbery and shooting. There was evidence from which a jury could infer that Martin, not Mr. Young, attempted the robbery with Lawrence's gun after Mr. Young told Martin about the money in the drug house. Mr. Young failed to get a weapon from Mr. Dixon, but Martin managed to get a gun from Lawrence. It is possible, logical and likely that Martin went to the house to commit the robbery. At least one witness placed Martin and his car at or near the scene. (18a). It could be inferred that Martin arrived at the drug house to find Mr. Young in the bedroom with Ms. Burks and the drop-off man already gone from the house with the money. In frustration, he shot both complainants. He then stashed the gun in a field near his house and explained to Lawrence that their plan had failed. When the police suspected Martin's involvement and took him in for questioning, he and Lawrence ultimately settled on the account they described at trial -- Mr. Young committed the shootings with Lawrence's gun, and he told them about the planning and outcome of the attempted robbery in vivid detail.

The scenario implicating Martin and Lawrence and their testimony at trial provides a scenario as likely as that presented against Mr. Young at trial. Any combination of events could have taken place and it is unclear from the evidence exactly what happened. What is clear is that by any standard, Martin and Lawrence are disputed accomplices.

In addition to these two witnesses specifically named by the Court in its grant of leave, there is evidence to infer that an additional witness for the prosecution, Ronald Mathis (a.k.a. "Hound") could have been involved in the shootings. The trial played out so that the three

principal prosecution witnesses could have been the perpetrator alone or in conjunction with others.

A. Definition of Accomplice

"A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice." (CJI2d 5.5(2)). Martin, Lawrence, and Mathis' testimony revealed that a jury could have considered them accomplices.

Accordingly, the jury should have received first the disputed accomplices instruction, CJI2d 5.5 and then the accomplice testimony instruction, CJI2d 5.6.[7]

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[7] CJI2d 5.5 provides:
(1) Before you may consider what [name witness] said in court, you must decide whether [he/she] took part in the crime the defendant is charged with committing. [Name witness] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.
(2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.
(3) When you think about [name witness]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [name witness] was an accomplice, then you must consider [his/her] testimony in the following way:

CJI2d 5.6 provides:
(1) You should examine an accomplice's testimony closely and be very careful about accepting it.
(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
(3) When you decide whether you believe an accomplice, consider the following:
(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?
(b) Has the accomplice been offered a reward or been promised anything that might lead [him / her] to give false testimony?

As long as there is evidence for a jury to infer that witnesses are accomplices, then providing the disputed accomplice instruction is appropriate. In People v Smith, 158 Mich App 220, 229; 405 NW2d 156 (1987), the prosecution argued that a witness was not an accomplice in a shooting even though the witness was originally charged with committing the murder. The Court of Appeals held that although the witness did not admit to being an accomplice, "there was evidence from which the jury could have concluded that [the witness] was in fact an accomplice." Id.

In People v Perry, 218 Mich App 520; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999), the defendant and Jason Ricco left the Ricco home to firebomb a neighbor's house. Although Ricco had previously threatened to firebomb the victims' house and had helped make and test the Molotov cocktails, he testified at defendant Perry's trial that he discouraged Perry from throwing the firebomb into the victims' house, that he ran back home, and that he heard two "whooshes" when the Molotov cocktails ignited. Ricco was tried in juvenile court, where he was acquitted of the murders but convicted of arson. On appeal, defendant Perry argued that the trial court erred in giving the disputed accomplice instruction (CJI2d 5.5), instead of the undisputed accomplice instruction (CJI2d 5.4). The Court of Appeals found that the trial court did not abuse its discretion in giving the disputed accomplice instruction (CJI2d 5.5) where there was a factual dispute whether the witness (Ricco) took part in the crimes that the defendant was charged with

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(c) Has the accomplice been promised that [he / she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his / her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

committing (Ricco never admitted participating in or encouraging the murders and attempted murders of the victims).

Thus, to be entitled to a cautionary instruction, it is not necessary that the witness be an admitted or a proven accomplice. According to CJI2d 5.5, Witness a Disputed Accomplice, if there is evidence that could lead a juror to think that the witness took part in the crime the defendant is charged with committing, the jury is to decide if the witness is an accomplice. If it is decided in the affirmative, then the jury is to evaluate that witness's testimony according to the cautions described in CJI2d 5.6, "Cautionary Instruction Regarding Accomplice Testimony." Here, the jury heard evidence that could have led them to believe either Martin, Lawrence, or Mathis, or perhaps all three, were the perpetrator and/or accomplices.

B. Michael Martin

Martin testified to an absolute lack of involvement in every stage of the crime and its preparation. However, the extent of both his knowledge and admitted participation provide plenty of evidence to infer that he was the perpetrator or an accomplice to the planned robbery and eventual shooting.

For instance, Martin repeatedly claimed to have no direct involvement in Mr. Young's acquisition of the gun. Yet when Martin failed to provide a gun to Mr. Young, he called Lawrence and put Mr. Young on the phone with him. He then immediately drove with Mr. Young to Lawrence's house. (4-5a). Martin initially claimed that at Lawrence's house he waited in the front room while Mr. Young and Lawrence walked to the kitchen and Lawrence went upstairs and that he was not present during their conversation. (5-6a). On cross-examination, Martin shifted his account to say that "I know Wayne and him put something inside his pants at the time he was getting ready to leave." (23a). Finally, Martin admitted to calling

Lawrence because he felt Young shot somebody with *his gun*. (30a). In this way, Martin altered his testimony from complete ignorance of Lawrence's provision of the gun, to seeing something passed, to knowing it was a gun that Lawrence gave Mr. Young.

Although he never quite admitted it, he either facilitated Mr. Young's acquisition of the gun for the robbery, or acquired the gun himself to commit the robbery. By his own account, he called Lawrence, put Mr. Young on the phone, escorted Mr. Young to Lawrence's house, watched Lawrence give Mr. Young the gun, and then left with Mr. Young.

In a similar fashion, Martin's testimony evolved to reveal an extensive knowledge of both the robbery plot and the house on Seymour Street. He first said that Mr. Young called him from the house, "trying to debate on how he was going to rob the people." (8a). When he received this phone call, Martin said "I told him I was getting ready to go to the store and I hung up the phone" (8a). However, Martin later says that upon receiving the phone call, he asked Mr. Young a number of questions because "I listened to him tell me where he was at and then because he told me, I ask him what was going on." (26a). Martin stated that during this conversation, he learned that Mr. Young was in the southwest bedroom with complainant Pauline Burks and that the 'drop-off man' had taken the money, but would soon return with more money and drugs. (17a, 20a, 25a, 27-28a).

It strains credibility that Martin could have gleaned this information from a phone call. Martin implied at trial that Mr. Young called him to "debate" aspects of the robbery as he stood in the same room as one of the eventual victims. A more likely explanation for Mr. Martin's specific knowledge of Mr. Young's position in the house is that he was there. When he arrived at the house, Martin found Mr. Young in the southwest bedroom with Pauline Burks and the "drop-off man" already departed with the money. Similarly, a more likely explanation for

Martin's information about the money and the "drop-off man" is that Martin formulated the plan to commit the robbery after hearing about the setup of the drug house from Mr. Young.

The police investigator found damage to a doorjamb and signs of forced entry to the drug house. (57a, 59a). But, Mr. Young knew the complainants and was welcome there. Indeed even Martin described Mr. Young as in the bedroom with one of the complainants. (17a, 25a, 27a). It is therefore likely that Martin actually broke into the house to commit the robbery rather than Mr. Young.

After the shooting, Martin acted in a manner consistent with that of being the perpetrator and/or an accomplice in the crime. He testified that he let Mr. Young change from a black T-shirt to a white one, thereby helping him to evade identification. (11-12a). Then, instead of staying away from an allegedly admitted killer, he and Lawrence went to see Young immediately after the shooting. (13a). Their decision to get pizza before arriving at Mr. Young's house demonstrated the lack of Martin and Lawrence's concern about the shootings. (30a). Finally, Martin recovered the gun used in the shooting, wrapped it up in a plastic bag, and placed it in Lawrence's trunk. (15a, 38a). The gun came from a field right next door to Martin's house, "toward the backyard," an extraordinary coincidence given Martin's supposed lack of involvement in the shooting. (14a).

The police investigation certainly identified Martin as a suspect. Hours after the shooting, police picked Martin up at his house and took him to the homicide division for questioning. (17-18a). The police revealed that somebody saw Martin and his car in the vicinity of the shooting. (18a). The following day, police returned to Martin's house and took him back to the homicide division for more questioning. (21a). During this interrogation, detectives read Martin his *Miranda* rights and he did not feel like he could leave. (21a, 32a).

It is not surprising that under these latter conditions, Martin's exculpatory story that shifted all the blame on Mr. Young took shape. Martin revealed that Mr. Young asked him for a gun to "hit a lick," or to commit a robbery. Martin explained that Lawrence eventually lent Mr. Young this gun. Martin told police he later retrieved the gun from a field next to his house and that the shooting took place around the corner from his house. (19-21a, 29a). When he realized he was absolutely cornered, Martin shifted the responsibility solely to Mr. Young.

Martin's statements, descriptions, knowledge, and omissions all provide evidence that he was either the perpetrator or an accomplice in the robbery and shooting. The investigation showed that detectives thought he was involved.

C. Eugene Lawrence

Evidence showed Lawrence to be involved with the planning and aftermath of the robbery, if not the actual execution. This degree of involvement still made him an accomplice.

Lawrence testified that he provided Mr. Young with the gun for the robbery. According to Martin, after he handed the gun over, "my brother-in-law was saying he going to get in trouble for whatever him and Wayne had talked about." (23a). In closing argument, the prosecuting attorney speculated that this statement refers to Lawrence getting in trouble with his wife, the owner of the gun. (65a). However, that assumption is a question of fact for the jury to decide. They could certainly have concluded that Lawrence lent Mr. Young or Martin the gun fully aware of the robbery plot and hoping to share in the proceeds. Therefore, they could have concluded that Lawrence was afraid of the possible consequences.

Following the shootings, Lawrence went with Martin to see Mr. Young, stopping for pizza on the way. Allegedly they wanted to get his wife's gun back. If Lawrence truly lent Mr. Young the gun, he never would have later gone to Mr. Young's house. Mr. Young supposedly

had just used the gun to shoot two people! As a potential witness, Lawrence would have endangered himself. Instead, the alleged facts point to a fabricated story. Martin and Lawrence invented this encounter completely so they could blame Mr. Young with the shooting. Indeed, Lawrence sat in his car while Martin recovered the gun from a field just behind his house, wrapped it up, and put it in his trunk. (38a). Lawrence certainly acted like somebody involved in the robbery.

Lawrence's testimony at trial contradicted that of Martin in a fashion that would potentially have prompted the jury to find him an accomplice. Martin testified that he called Lawrence to tell him that Mr. Young shot two people. (12a). In contrast, Lawrence testified that he received no information from Martin when he called, and that he only discovered the shooting when he got to Martin's house. (39a). Martin testified that he recovered the gun from a field behind his house, while Lawrence stated that somebody handed the gun to Martin. (14-15a, 38a).

Perhaps the best illustration of Lawrence's role as an accomplice was his own admitted behavior during the aftermath of the crime. Lawrence said that he discouraged Martin from telling the police about the gun because "I thought I was going to get in trouble for loaning him that gun." (38a). Lawrence acted like an accomplice and he knew the police would consider him to be involved.

D. Ronald Mathis

Ronald Mathis admitted to seeing Burks and Conley fifteen minutes before discovering they had been shot. (40a, 44a). He also admitted to discussing the purchase of a gun with a man whom he later identified as Mr. Young. (41-43a, 49a). Cedric Butler sat on his porch near the Seymour Street house on the day of the shooting when he heard gunshots. The only person he

saw enter or leave the house that afternoon was a man he knew as "Hound." (53-56a). Mathis' nickname is "Hound." (47a).

The jury should have considered Mathis as a potential accomplice. They likely would have found that somebody who discussed the purchase of the alleged shooter's gun with him fifteen minutes before the actual shooting was his accomplice. The jury certainly could have considered him involved when an absolutely unbiased witness described Mathis as the *only* person to enter the house before or after the shooting.

Like Martin and Lawrence, Mathis knew that he was a possible suspect. Mathis did not wait for the police, explaining that "I thought they might lock me up thinking I had something to do with it." (45a). He considered himself a potential accomplice, and properly instructed, the jury could have reached the same conclusion.

E. Jury Questions

The jury questions and process of deliberations reveal that the jury considered Martin and Lawrence potential accomplices. Their first note during deliberations requested the testimony of Martin and Lawrence. (104a). Of all the testimony heard at trial, they requested to rehear the accounts of the two disputed accomplices. They likely wanted to review their two accounts for inconsistencies and to determine their accuracy and credibility.

The Judge instructed the jury to use their collective memory to recall the testimony. (104a). On the second day of deliberations, the jury sent a note stating they were unable to reach a decision. (107a). The Judge provided the deadlocked jury instruction and less than two hours later the jury returned a verdict of guilty of four counts of second degree murder. (107-110a). The pattern of questions and response show a compromise by a frustrated jury. They did not get the testimony they needed. The court instructed them to continue deliberating when they could

not agree on a decision. Ultimately, in a case where the two victims were murdered execution style, at close range, one in the back of their head, one in the front, the jury still did not return a verdict of first degree murder. (110a). A frustrated panel reached a compromise. Had the jury been properly instructed, they would potentially have resolved this frustration in favor of reasonable doubt and an acquittal.

II. THE ISSUE OF CREDIBILITY WAS "CLOSELY DRAWN," WHERE MARTIN AND LAWRENCE WERE THE KEY PROSECUTION WITNESSES, REQUIRING REVERSAL BECAUSE THE COURT FAILED TO INSTRUCT THE JURY REGARDING ACCOMPLICE TESTIMONY.

In People v McCoy, 392 Mich 231, 240; 220 NW2d 456 (1975), the Court recognized the inherent untrustworthiness of accomplice testimony and the right of a defendant to a special cautionary instruction regarding the unreliability of testimony from such witnesses. The Court in McCoy ruled that after publication of the opinion, it would be reversible error to fail to give such a cautionary instruction if requested, and "if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." McCoy, supra, 240. As the Court explained in People v Reed, 453 Mich 685, 692; 556 NW2d 858 (1996):

> This rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. The problem with such testimony is two-fold. First, actual or implied threats or promises of leniency by the prosecutor will often induce an accomplice to fabricate testimony. Second, a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecutor. As the court noted in McCoy, `a long history of human frailty and governmental overreaching for conviction has justified distrust in accomplice testimony.'

Defense counsel did not request a special instruction on the unreliability of accomplice testimony. The Court of Appeals denied relief on the issue of ineffective assistance of counsel premised on trial counsel's failure to request the disputed instruction. (111a). People v Young, unpublished opinion per curiam of the Court of Appeals, decided September 25, 2003, 7 (Docket No. 240832). However, the trial court had a duty to *sua sponte* instruct the jury on the unreliability of accomplice testimony, even in the absence of a request or objection, where, as here, the issue of credibility was "closely drawn." People v McCoy, supra, 240. The McCoy

Court held that after publication of that opinion, it would be reversible error to fail to give a special cautionary instruction regarding the unreliability of accomplice if requested, and "if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." Id.

Defendant recognizes that in People v Carines, 460 Mich. 750, 762-765; 597 NW2d 130 (1999), this Court set forth a general rule that in the absence of an objection or request for specific jury instructions, review of allegedly defective jury instructions is warranted only when the failure to give such instructions constituted "plain error". See also People v Grant, 445 Mich 535, 547-549, 553; 520 NW2d 123 (1994). In Carines, the Court "reaffirmed" its prior decision in Grant, which adopted the "plain error" standard from United States v Olano, 507 US 725; 113 SCt 1770 (1993). Under that rule, an error may be considered on appeal if: 1) an error occurred, 2) the error was plain, 3) and the plain error affected substantial rights. Olano, supra, 731-734. The Court in Carines, supra, 763, citing Olano, at 734, stated that this third requirement normally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The Court in Carines, supra, 764, specifically reaffirmed its prior holding in Grant, which stated with respect to this requirement that:

> "a plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." Grant, supra, 553.

Defendant believes that the Court's holding in McCoy already incorporates such a "plain error" standard -- in limiting its ruling to situations where the question of credibility between the defendant and an accomplice is "closely drawn", the Court in McCoy selected situations where the failure to give an instruction on accomplice testimony would prejudice the defendant, where it would probably "be decisive of the outcome". Grant, supra, 553.

In the present case, it was "plain error" for the trial court to fail to instruct the jury on the unreliability of accomplice testimony, when the issue was "closely drawn". This omission prejudiced Mr. Young. Given that Martin, Lawrence and Mathis were the key prosecution witnesses, had the jury been given an instruction by the court to consider their testimony under different, more stringent, standards than that of other witnesses, and to accept it more cautiously than that of other witnesses, there was a reasonable probability that the jury may have found insufficient evidence to show guilt beyond a reasonable doubt.

This Court should therefore reverse, because the error may well have resulted in the conviction of an innocent Defendant. The failure to instruct on this fundamental aspect of witness credibility "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." Olano, supra, 736-737; People v Carines, supra, 772-773.

A. The issue in Mr. Young's case is "closely drawn."

Mr. Young's trial provides a typical example of a "closely drawn" case. There are no eyewitnesses to the actual offense. All three principal fact witnesses were potential perpetrators and/or accomplices, afraid of becoming suspects themselves. Police interrogated Martin twice. Lawrence admitted he told Martin to lie about the gun because he thought he might "get into trouble." (38a). Mathis left the scene before police arrived knowing that he could get blamed for the shootings. (45a). Each of these witnesses provided circumstantial evidence that was tainted by their motive to save themselves. Accordingly, this evidence became subject to a credibility contest.

Both counsels' closing arguments demonstrate that Mr. Young's trial was a "closely-drawn" contest. The prosecuting attorney said "I'm sure when they get an opportunity to close,

they will tell you, well, you know what some of the witnesses kind of changed their story." (66a). Specifically, the prosecuting attorney defended Mathis, claiming that "he testified honestly." (66a). The defense attorney attacked the demeanor, credibility, and defensiveness of Lawrence. (67a). She questioned Mathis' reliability and motivation as a drug dealer. (68a). She discussed Martin's motive to fabricate due to his status as a potential suspect. (68a). Defense counsel noted that "the only evidence that we have or you have heard about this alleged robbery, are his *so-called* admissions to Mr. Martin and Mr. Lawrence." (69a). Counsel concluded with the observation that "you know when someone is a suspect, they will do what they can to get the suspicion away from them." (70a). The defense and prosecution each recognized the case as a "closely drawn" credibility contest by arguing for and against the credibility of Martin, Lawrence, and Mathis.

The Court of Appeals distinguished Mr. Young's matter from a "closely drawn" one because it did "not present nearly the same level as a credibility contest." (111a). People v Young, unpublished opinion per curiam of the Court of Appeals, decided September 25, 2003, 2 (Docket No. 240832). The Court based this distinction on evidence it identified as corroborating the testimony of Martin and Lawrence.

The Court noted that Martin and Lawrence provided corroboration for each other's testimony. However, the fact that two accomplices testified to the same story only made accomplice instructions more critical. It would have been reasonable for a jury to find that Martin and Lawrence formulated their account of events together in order to absolve themselves of responsibility and blame Mr. Young. The accomplice instructions would have put in context the weight to give such a conclusion.

In fact, the inconsistencies in Martin and Lawrence's testimony demonstrate some of the problems with their credibility. As noted in the previous section, they gave differing accounts of the recovery of the gun and their phone conversation after the shooting. (12a, 14-15a, 38-39a).

The Court also pointed to the testimony of Mathis, which placed Mr. Young at the scene as corroboration. However, Mathis is also a potential accomplice. Cumulative testimony of multiple accomplices does not remove the need for an accomplice instruction and does not make the facts any less "closely drawn."

The other instances of corroborating evidence do not remove the importance of the accomplice testimony and the need for an accomplice instruction. DNA evidence placed Mr. Young in the bedroom of the house and Mr. Young asked Marquis Dixon for a gun. (60-62a). However, these facts corroborate both the prosecution theory that Mr. Young was the shooter and a defense theory that two accomplices blamed Mr. Young to save themselves.

Mr. Young told Martin and Lawrence about his plans for a robbery at the drug house he frequented. Mr. Young initially tried to get a gun from Dixon (who was Martin's girlfriend's nephew) and then Lawrence instead supplied a gun to Martin. Mr. Young went to the drug house and was in the bedroom with Pauline Burks when Martin arrived to rob the occupants. Martin found that nobody had money because the "drop-off" man had already left and in his frustration shot the complainants. The above factual scenario is consistent with all the corroborating evidence cited by the court -- Dixon's account, Mathis' testimony, and the DNA evidence.

The accomplice testimony provided the evidence to convict Mr. Young acting alone. An instruction could have helped the jury acknowledge that he may have been nothing more than a bystander to Martin's shooting.

The circumstances in Mr. Young's case mirror those of other cases which appellate courts have found "closely drawn." In People v Gordon Hall, 77 Mich App 528, 531; 258 NW2d 547 (1977), the Court of Appeals held that the issue was "closely drawn" where the "sole evidence linking defendant to the offense" was the testimony of the accomplice and the "[d]efendant made a total denial of participation both in the crime and with [the accomplice]." In finding reversible error, the Court of Appeals ruled that the trial became a credibility contest between the accomplice and the defendant, stating, "We can conceive of no more closely drawn factual issue involving accomplice testimony." Id. at 531-532.

The prevailing standard for "closely drawn" is the existence of such a credibility contest between the defendant and accomplices. People v Jensen, 162 Mich App 171, 186-190; 412 NW2d 681 (1987) ("The issue is 'closely drawn' if the trial is essentially a credibility contest between the defendant and the accomplice"); People v Fredericks, 125 Mich App 114, 120-122; 335 NW2d 919 (1983) (issue is "closely drawn", where the only witnesses linking the defendant to participation in the crime were accomplices); People v Smith, 158 Mich App 220, 229; 405 NW2d 156 (1987) (finding the issue "closely drawn" where the only witness to testify to a shooting was the alleged accomplice). Mr. Young's case evidences a credibility contest.

A case is especially likely to be closely drawn where, as in Mr. Young's situation, there are no eyewitnesses to the actual events. See People v Jackson, 97 Mich App 660, 666; 296 NW2d 135 (1980) (finding issue "closely drawn," where "there were no eyewitnesses to the actual shooting, the question came down to whom to believe, the defendant or the accomplices"); People v Heikkinen, 250 Mich App 322, 337; 646 NW2d 190 (2002) (finding issue "closely drawn" where there were no other eyewitnesses and the trial was a credibility contest).

Cases found not to be "closely drawn" often provide multiple pieces of evidence or incontrovertible corroboration. Such evidence did not exist in Mr. Young's case. See People v Gonzalez, 468 Mich. 636, 644; 664 NW2d 159 (2003) (not closely drawn because DNA evidence excluded the accomplice from being involved in the sexual assault at issue); People v Perry, 218 Mich App 520, 530; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999) (finding no "closely drawn" issue where corroboration included non-accomplice eyewitnesses placing defendant at the scene and admitting to the crime). As this Court has recognized, the McCoy rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. People v McCoy, supra, 236 (quoting 30 AmJur2d, Evidence, §1148, p 323); People v Reed, supra, 691-692. The motivations of an accomplice witness to testify are diverse, and a close examination of the circumstances of each case is necessary in order to determine whether a cautionary instruction is warranted. Certainly in the case of Mr. Young, such an instruction was warranted because of the real possibility that Martin shot the victims after Lawrence supplied the gun, or at least that the two served as accomplices and perhaps conspired with one another to blame Mr. Young.

B. The failure of the trial judge to give an accomplice instruction, when the issue of credibility was "closely drawn," was not harmless.

Defense counsel argued in closing argument that "you know when someone is a suspect, they will do what they can to get the suspicion away from them." (70a). This was not an adequate substitute for a jury instruction telling the jury to judge that accomplice-witness's testimony by more stringent standards than other witnesses. As the United States Supreme Court has stated on more than one occasion, such as in Taylor v Kentucky, 436 US 478, 488-489; 98 SCt 1930 (1978), and again in Carter v Kentucky, 450 US 288, 304; 101 SCt 1112 (1981):

"[A]rguments of counsel cannot substitute for instructions by the court." Such a rule was specifically applied to accomplice instructions by the Court of Appeals in People v Smith, supra, 158 Mich App at 230, where the Court of Appeals held:

> "While defendant's counsel made the jury aware of [the witness's] motivation to lie and the jury received general instructions on witness credibility, we believe such was insufficient given the credibility contest presented here and the strong emphasis placed by the Supreme Court on accomplice instructions in the face of a close fact question that is nothing more than a credibility contest between the defendant and accomplices."

As the Court similarly stated in United States v Bernard, 625 F2d 854, 857 (CA 9, 1980):

> The Government's theory that the summation arguments of the defendants' counsel adequately admonished the jury to consider accomplice testimony with caution is unpersuasive. A jury's response to instructions from the judge is, and should be, quite different from its response to arguments from counsel. Counsel's argument is neither law nor evidence, and the jury is so instructed.

The error here was not harmless. Reversal is warranted as the error here resulted in the conviction of a potentially innocent defendant and seriously affected the fairness, integrity or public reputation of judicial proceedings. Defense counsel's closing argument was no substitute for an instruction by the court telling the jury that they were to judge Martin, Lawrence, and Mathis' testimony by standards different and more stringent than other witnesses.

Furthermore, the trial court's general instructions on witness credibility were insufficient. Here, the distinction between what the jury was told and what it should have been told is significant. The jury was instructed only in general terms relative to the weight to be given the testimony of witnesses. It should have been specifically instructed that it should view the testimony of the three accomplices with distrust.

The Court in People v McCoy, supra, recognized that an instruction on the unreliability of accomplice testimony is so important to a fair determination of guilt or innocence, that it is reversible error to refuse to give it when requested, and that it may be reversible error when a

trial judge fails to give it *sua sponte*, even if not requested, when a case is closely drawn. In the present case, the case was clearly a "closely drawn" one. Such an instruction may well have made the difference between a verdict of guilt or innocence in this case. Under such circumstances, the trial court's failure to give a cautionary instruction on the unreliability of accomplice testimony requires reversal for a new trial.

III. THE RULE OF PEOPLE V MCCOY IS CONSISTENT WITH MCL 768.29 AND MCR 2.516(C) AS PART OF PLAIN ERROR ANALYSIS.

This Court granted leave on the question of "whether the 'closely drawn' rule announced by People v McCoy, 392 Mich 231, 240; 220 NW2d 456 (1974) is inconsistent with MCL 768.29 and MCR 2.516(C)" (119-120a). These provisions require counsel to request appropriate jury instructions or object to faulty ones in order to preserve an appeal.[8]

While not specifically addressing the "closely drawn" rule, this Court already answered this question in People v Gonzalez, 468 Mich 636, 642-643; 664 NW2d 159 (2003), where defense counsel failed to request the accomplice instruction:

> In this case, defendant neither requested a cautionary accomplice instruction nor objected to the court's failure to give one. Therefore, defendant is precluded from arguing that the omitted instruction was error. MCR 2.516(C). Furthermore, because he failed to request the omitted instruction, defendant is not entitled to have the verdict set aside. M.C.L. § 768.29. Consequently, defendants only remaining avenue for relief is for review under People v Grant, 445 Mich 535, 520 NW2d 123 (1994).
>
> Because defendant failed to object to the omitted instruction, defendant's claim of error was forfeited. A forfeited, nonconstitutional error may not be considered by an appellate court unless the error was plain and it affected defendant's substantial rights. Grant, supra at 552-553, 520 NW2d 123. People v Gonzalez, 468 Mich at 642-643.

A "plain error" analysis is applicable where an accomplice instruction might have been appropriate.

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[8] MCL 768.29, "Duty of Judge at Trial; effect of failure to instruct," states that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCR 2.516(C), "Instructions to the jury, objections," states that "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict ... stating specifically the matter to which the party objects and the grounds for the objection."

McCoy therefore provides one example of a plain error analysis in the issue of accomplice testimony. The McCoy court found that it "if the issue is *closely drawn*, it *may* be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." People v McCoy, supra (emphasis added). In remanding for a new trial, the court applied the equivalent of a "plain error" analysis, finding a serious error that implicated the defendant's right to a fair trail. McCoy, supra, 240. The "closely drawn" nature of the trial demonstrated the existence of a plain error prejudicing the defendant.

In the case of Mr. Young, the failure to provide first the disputed accomplice instruction (CJI2d 5.5), and the subsequent accomplice instruction (CJI2d 5.6) prevented the jury from placing their conclusions about the case in context. Martin, Lawrence, and Mathis, three potential perpetrators and/or accomplices, all with a motive to protect themselves, provided the evidence against Mr. Young. The jury even requested a review of Martin and Lawrence's testimony. Some jurors may have felt that Martin and Lawrence fabricated their account to save themselves and put the blame on a man they knew to be in the house. The accomplice instructions could have directed these suspicions and potentially reversed the jury's verdict.

Similarly, the jurors might have felt that since Mr. Young did not present defense witnesses to offer an alternative account, they had to believe the testimony of Martin and Lawrence. An instruction would have demonstrated the problems with their testimony and allowed them to discard it.

The "plain error" analysis provides a consistent and reasonable approach for evaluating the need for accomplice instructions. The McCoy court described the unique problems with accomplice testimony:

> The facts that the testimony of accomplices is not of the most

> satisfactory character and that it is attended with serious infirmities are matters recognized by the decisions and are too obvious and well understood to call for extended exposition. Testimony of an accomplice has been held to be fraught with weakness due to the effect of fear, threats, hostility, motives, or hope of leniency. The consideration of the infirmities of this kind of testimony goes to the credibility of the evidence and the law requires that such testimony be closely scrutinized and accepted with caution. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction has justified distrust in accomplice testimony. It has been said that a skeptical approach to accomplice testimony is a mark of the fair administration of justice. 392 Mich 231, 236; 220 NW2d 456 (1974) (quoting 30 AmJur2d, Evidence, §1148, p 323).

As demonstrated in the case of Mr. Young, accomplice testimony is uniquely problematic and particularly vulnerable to "plain error" analysis without a curative instruction.

The accomplice instruction fits then into the same category of cases where faulty jury instructions implicate constitutional due process concerns by denying a proper defense. See Sullivan v Louisiana, 508 US 275; 113 SCt 2078 (1993) (finding faulty reasonable doubt instructions denied a fair trial); People v Rodriguez, 463 Mich 466, 474; 620 NW2d 13 (2000) (finding 'outcome determinative' error where court refused to give jury instruction offering an exemption to the tax evasion charge at issue); People v Kurr, 253 Mich App 317, 327-328; 654 NW2d 651 (2002) (concluding that failure to give a defense of others instruction where applicable denied defendant a due process right). Accomplice instructions are analogous to those that a judge is required to provide a jury in order to guarantee a fair trial.

In addition to requiring defense counsel to request appropriate jury instructions in order to preserve appellate rights, MCL 768.29 mandates that a trial court "instruct the jury as to the law applicable to the case." By failing to do so in Mr. Young's trial with regards to accomplice instructions, the trial court committed the sort of "plain error" described in People v McCoy. Accordingly, this Court must reverse Mr. Young's convictions and remand for a new trial.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant **WAYNE YOUNG** asks that this Honorable Court reverse the Court of Appeals' affirmation of his convictions and remand for a new trial.

Respectfully submitted,

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Dated: August 13, 2004